Supreme Court, U.S.
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No. 98-1035

In The

Supreme Court of the United States

October Term, 1998

THE STATE-RECORD CO., INC.,

Petitioner,

v.

B. J. QUATTLEBAUM,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

An action styled *The State of South Carolina v. B. J. Quattlebaum*, 95-GS-32-0669, was pending in the Court of General Sessions for the Eleventh Judicial Circuit in the state of South Carolina (the "*Quattlebaum* action"). In the *Quattlebaum* action, B. J. Quattlebaum (the "accused") was indicted and was being tried for murder, among other things. After the accused was indicted and incarcerated in Lexington County Jail in South Carolina, a videotape was made of an attorney-client privileged conversation between the accused and his then attorney. The videotape was made without the accused's knowledge or consent. Further, and without the accused's consent, the videotape was somehow disseminated to the media, and certain members of the media reported to the public the existence of the videotape, the identity of the individuals and the fact that the accused was speaking with his then attorney on the videotape.[1] The media, however, did not disclose the contents of the tape. The accused's case was a death penalty case which received media attention throughout the state, in large part, due to the videotape in question.

On August 18, 1997, the accused filed a motion for a temporary restraining order requesting restraint of dissemination of the audio portion of the videotape which contained the content of the attorney-client privileged conversation. On August 18, 1997, the Court of General

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[1] How this videotape was made and disseminated was never disputed in this matter. Further, there was never any challenge as to whether the conversation on the videotape contained an attorney-client privileged communication.

Sessions for the Eleventh Judicial Circuit ("trial court") issued a Temporary Restraining Order which stated in part " . . . that all participants, including prosecution, law enforcement, the defense and all media be prohibited from disseminating the substance and details of the privileged communication between the Defendant and his counsel." *App. 34-36.*

On August 19, 1997, the Petitioners moved to dissolve the August 18 Order, and on that same day the trial court held oral argument on Petitioners' Motion. *App. 37-42.* After this argument, the trial court held that "[t]he limitations of the Restraining Order are to remain in effect until the jury in this case is empaneled and sequestered, at which time they will be lifted." *App. 37-42.*

On August 31, 1998, the Supreme Court of South Carolina affirmed the trial court's order. *App. 1-33.* On September 25, 1998, the Supreme Court of South Carolina then denied Petitioner's Petition for Rehearing. *App. 43.* Petitioners now have filed this Petition for Writ of Certiorari.

REASONS FOR DENYING THIS PETITION

I. THE SUPREME COURT OF SOUTH CAROLINA DECIDED A FEDERAL QUESTION IN COMPLIANCE WITH *NEBRASKA PRESS ASSOCIATION v. STUART*, 427 U.S. 539 (1976).

This case involves the accused's Sixth Amendment right to a fair trial balanced against the media's alleged

First Amendment right to unfettered access to and dissemination of the contents of the tape in question which contains an illegally obtained, attorney/client privileged communication between the accused and his attorney. Further, this case was a death penalty case, which received media attention, in large part, because of the videotape in question. Thus, the focus of the media attention was the content of the tape – what the accused had disclosed to his attorney.

As noted, the communication which was prohibited from publication involved the accused while the accused was detained at the Lexington County Jail, Lexington, South Carolina. While he was detained at the Lexington County Jail and while he was having a conversation with his attorney, the South Carolina Lexington County Sheriff's Department without the knowledge or permission of either the accused or his attorney, video and audio taped the accused's privileged conversation with his attorney. Thus, this attorney/client privileged conversation was obtained through surreptitious and unlawful means and without the knowledge, consent or approval of either of the participants to these privileged communications.

The trial court was then faced with the situation of whether a privileged communication taped surreptitiously and by unlawful means should be disseminated to the public prior to trial. Additionally, although there had been limited publicity in this case related to the crime itself, the majority of the publicity centered around the fact that this attorney/client privileged tape had been made. Thus, the trial court was faced with the quandary that the information sought to be disseminated by the

media was an illegally obtained, privileged communication between the accused and his attorney, and that the media coverage was predominately about the fact that this tape had been made. It was under this limited factual scenario that the trial court was charged with weighing the accused's Sixth Amendment right to a fair trial with the press' First Amendment right to disseminate to the public an illegally taped confidential attorney/client conversation. This Court has held that " . . . the guarantees of freedom of expression are not an absolute prohibition under all circumstances . . . " (*Nebraska*, 427 U.S. at 570) and that "[n]ewspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial." *Sheppard v. Florida*, 341 U.S. 50, 52 (1951).

Petitioners improperly argue that the trial court and South Carolina Supreme Court failed to follow the balancing test set forth in *Nebraska* when deciding that for a limited time the contents of the tape should not have been disclosed. Petitioners are wrong. Here, the trial judge acted responsibly out of a legitimate concern to protect the accused's right to a fair trial. The trial court and then the South Carolina Supreme Court correctly applied the balancing test set forth in *Nebraska* determining (1) the nature and extent of the pretrial news coverage; (2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger. *Nebraska*, 427 U.S. at 562.

As to the first prong of the *Nebraska* test, the nature and extent of the pretrial news coverage, the trial court had sufficient evidence before him by way of affidavit

(App. 46, 47), that the tape in question contained an attorney/client privileged communication which was surreptitiously and unlawfully obtained.[2] Additionally, the trial court had sufficient evidence before him by way of this same affidavit, that this tape had been disseminated to a television station. Further, it was common knowledge that this station broadcasted the news in the area from which potential jurors would be called. Further, this television station did, in fact, air the video portion of the tape and reported that the tape had been made of the accused talking to his attorney while the accused was incarcerated and awaiting trial. From this evidence, the trial court could reasonably conclude that the release of the contents of the tape would impair the accused's right to a fair trial.

Further, the Supreme Court of South Carolina correctly held that:

> Here, as to the first element, although Quattlebaum's case was not extremely "sensational," it was a death penalty case which received media attention throughout the state due, in large part, to the videotape in question. We find sufficient evidence in the record from which to conclude the pretrial publicity in this case had the potential to impair Quattlebaum's right to a fair trial.

This Court has held as to the first prong of the *Nebraska* test,

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[2] Indeed, as noted, the Petitioners never challenged that the contents of the videotape contained an attorney/client privileged conversation and never challenged the method by which it was obtained.

> [the trial court] could also reasonably conclude, based on common man experience, that publicity might impair the defendant's right to a fair trial . . . His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

Nebraska, 427 U.S. at 563. In the instant case, when dealing with factors unknown and unknowable, the trial judge reasonably concluded that there would be pervasive pretrial publicity concerning the contents of this tape. Indeed, there had been pervasive pretrial publicity simply about the existence of the tape alone.

As to the second prong of the *Nebraska* test, whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, the trial court found that:

> the Sixth Amendment right to a fair trial is an absolute right and the attorney/client privilege is a critical element in the fair trial process. And that privilege has been invaded in this case . . . but the fact that the privilege had been invaded in this case may by its very nature, the very invasion alone, may have an impact on the Defendant's ability to get a fair trial . . . the publication and transmission of that privileged communication or its characterization would make it much more unlikely that the Defendant could obtain a fair and impartial trial, given even all the protections that our system has in place to ensure a fair and impartial trial. And that's a risk that is too great to take, not only from the standpoint of the Defendant's concerns, he is literally on trial for his life, but also for the basic need to protect the integrity of the judicial process.

App. 40-41. Further, as to the second prong of the *Nebraska* test, the Supreme Court of South Carolina properly held that:

> Once disclosed, although other measures might have **alleviated** the prejudice to Quattlebaum, his right to a fair trial could not have been guaranteed. *FN19* Once a privileged communication has been disclosed to the public, it can never be recalled and the right to a fair trial may have been forever jeopardized. *Accord United States v. Davis*, 904 F.Supp. 564, 569 (E.D.La. 1995) (it is difficult, if not impossible, to "unring a bell").

App. 14. Here, the trial judge concluded and the Supreme Court of South Carolina affirmed that once the privileged attorney/client conversation has been disclosed, it could never be recalled. Thus, a change in venue, postponement of trial, searching questioning of prospective jurors or the use of clear instructions would not protect the accused because once the illegally obtained attorney/client communication was disclosed, it could never be recalled and once disclosed, the accused's right to a fair trial may forever be jeopardized. Thus, the only method available to protect this privilege communication was a bar on the release on the contents of the videotape. Further, it is important to note that the release of the contents of this tape could have severely, adversely impacted the attorney's trial strategy in representing the accused in this case giving the prosecution an improper and unfair advantage. It is also important to note here that the trial court did not attempt to limit the press coverage as to the fact that the tape existed, that it contained a conversation between the accused and his attorney. It only attempted

to protect the attorney/client privileged conversation for as long as necessary.

This Court has expressly recognized that "the attorney/client privilege enjoys a special position as the 'oldest of the privileges of confidential communications known to the common law' and that the privilege serves as a salutary and important purpose to encourage full and frank communication between attorneys and their clients and thereby promote the broader public interest in the observance of law and in the administration of justice." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981). Further, this Court has held that "the First Amendment does not guarantee the press a constitutional right or special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Here, it cannot be disputed and in fact has not been disputed that the attorney/client privileged communication in question was not public. The general public is not entitled to special access to the attorney/client privileged information; neither are Petitioners. Here, the trial judge made a reasonable, supported judgment that the only method available to protect this privileged communication was a bar on the release on the contents of the videotape.

Finally, as to the third prong of the *Nebraska* test, how effectively a restraining order would operate to prevent the threatened danger, the Supreme Court of South Carolina held that:

> Further, we find the third prong of *Nebraska Press* is met in this case. Undoubtedly, the prior restraint prevented prospective jurors from

> learning the contents of the privileged communication contained on the videotape. Clearly, it prevented the threatened danger to Quattlebaum's right to a fair trial.

App. 10. Further, the trial court recognized the necessity of this bar, but also recognized the need to make sure that the August 18 Order was narrowly drawn. The lower court did not bar the reporting of the existence of the videotape, the identity of the individuals on the videotape, or the fact that it was an attorney/client conversation, itself, was taking place. The lower court only barred the dissemination of the attorney/client privileged communication and barred the dissemination of this attorney/client privileged communication only so long as is necessary until the jury had been paneled and sequestered. This order was necessary to protect the accused's right to a fair trial, which included his right to maintain the confidentiality of privileged communications with his attorney. The Supreme Court of South Carolina correctly affirmed this decision.

Here, the First Amendment must give way to the Sixth Amendment. The trial court and the Supreme Court of South Carolina decided this issue in compliance with federal law, and Respondent respectfully submits that this Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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